109-229

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 81.

THE COUNTY COURT OF KNOX COUNTY AND THE JUDGES THEREOF, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES EX REL. THE WELLS & FRENCH COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

FILED OCTOBER 9, 1880.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the eastern district of Missouri, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, at the March term, 1880, thereof, between the United States ex rel. The Wells and French Company, relator, versus The County Court of Knox County and the Judges thereof, respondents, a manifest error hath happened, to the great damage of the said respondents, as by their complaint appears: We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States of America, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 13th day of May, in the year of our Lord one thousand eight hundred and eighty.

Issued at office in the city of St. Louis, with the seal of the circuit court of the United States for the eastern district of Missouri, dated as aforesaid.

[SEAL.] M. M. PRICE,
Clerk Circuit Court United States, Eastern District of Missouri.
By A. P. SELBY, *Deputy.*

Allowed by—

SAMUEL TREAT, *Judge.*

1*a* *Return to writ.*

UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the *the* record and proceedings in the within-entitled case, with all things concerning the same.

In witness whereof I hereto subscribe my name and affix the seal of said circuit court, at office in the city of St. Louis, this 12th day of August, A. D. 1880.

[SEAL.] M. M. PRICE,
Clerk of said Court,
By A. P. SELBY, *Deputy.*

(Indorsed:) No. 1525. United States circuit court, eastern district of Missouri. U. S. ex rel. Wells & French Company *vs.* Co. Court Knox Co., &c. Writ of error to the circuit court of the U. S., east'r' district of Missouri. Returned and filed , day of , 187 . clerk.

1b The United States of America to the Wells and French Company, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States of America, to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Missouri, wherein the County Court of Knox County and the Judges thereof are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Samuel Treat, judge of the circuit court of the United States for the eastern district of Missouri, this the 13th day of May, in the year of our Lord one thousand eight hundred and eighty.

SAMUEL TREAT,
Judge United States Circuit Court,
Eastern District of Missouri.

Service of the within citation is hereby acknowledged this day of July, 1880.

WELLS & FRENCH COMPANY,
By SLEEPER & WHITON,
Att'y of Same.

(Indorsed:) 1525. United States circuit court, east'r' district of Missouri. U. S. ex rel. Wells & French Company vs. County Court of Knox Co., &c. Citation filed May 13, 1880. M. M. Price, clerk.

2 UNITED STATES OF AMERICA,
Eastern District of Missouri, sct.:

In the circuit court of the United States in and for said district.

Be it remembered that on the first day of December, A. D. 1879, at a regular stated term of the circuit court of the United States in and for the eastern district of Missouri, begun and held at the city of St. Louis, in said district, on Monday, the 15th day of September, A. D. 1879, there was filed in said court a certain petition for mandamus in words and figures following, to wit:

Petition for mandamus.

UNITED STATES OF AMERICA,
Eastern District of Missouri:

September term, A. D. 1879.

UNITED STATES EX REL. THE WELLS AND French Company, plaintiffs,
vs.
KNOX COUNTY, IN THE STATE OF MISSOURI, and the County Court thereof, defendants.

To the honorable judges of said court:

3 The plaintiff, your petitioner, now comes and shows to the court

that on the 25th day of September, A. D. 1879, at the September term, A. D. 1879, of this honorable court, it obtained a judgment therein against Knox County, in the State of Missouri, for $24,627.24 (which bears 6 per cent. interest from the date of rendition thereof), and also for costs of said suit.

That said judgment was rendered for and on account of certain past-due bonds and coupons in the petition in said case described, being a part of certain bonds issued by said County of Knox, dated on the first of February, A. D. 1868, whereby said county acknowledged itself indebted and promised to pay the Missouri and Mississippi Railroad Company, or bearer, the said bonds and interest coupons in payment for stock subscribed to said company by said County of Knox under the authority of the laws of the State of Missouri and an act of the generul assembly of the State of Missouri, entitled "An act to incorporate the Missouri and Mississippi Railroad Company," approved Feb 26, 1865.

4 Your petitioner further shows that since the rendition of said judgment, to wit, on the 3rd day of November, A. D. 1879, it caused demand to be made upon said County of Knox for payment of said judgment, and payment thereof was refused.

Your petitioner further represents that on said 3rd day of November, A. D. 1879, it made demand upon the county court of said county, and upon Caspar Fetters, John Callaway, and Antoine Hunalt, justices thereof, for payment of said judgment, interest, and costs, and in default of such payment that the said county court and the justices thereof proceed to levy a special tax upon all the property in said county, made taxable by law for such purpose in said county, as would be sufficient to pay off and discharge said judgment with interest and costs, and the said county court and the justices thereof refused payment of said judgment or any part thereof, and also refused and neglected and still refuse and neglect to levy said tax, or any tax whatever for said purpose.

5 And your petitioner avers that it verily believes that said court and the justices thereof will refuse payment of said judgment, or to levy any tax therefor, unless compelled so to do by order of this court.

And your petitioner further represents that on the said 3rd day of November, 1879, it demanded of said county court and the justices thereof that said court should issue and deliver, or cause to be issued and delivered, to the plaintiff, a county warrant on the county treasury of said Knox County for the amount of said judgment, interest and costs, to be paid out of the general funds of the county on presentation, and that if there be not sufficient money in the county treasury to pay said judgment, interest, and costs, that the said county court would cause to be levied and collected as required by law an amount of money sufficient to pay said judgment, interest, and costs, all of which said county court refused and still refuses to do.

That said demand for payment and for said county warrant and for said levy and interest was made upon said county court and the justices thereof during the session of said county court, in open court, and

6 that to its demand so made was attached a certified copy of said judgment, showing the amount thereof, with interest, and the amount of costs accrued and taxed by the clerk of this court.

The plaintiff further represents that by the laws of the State of Missouri it is the duty of said county court to issue to the plaintiff said county warrant and to pay said judgment, interest, and costs, by the levy and collection of said taxes and in no other way; that said county has no funds except such as may be raised by taxation for such purpose, nor has said county any property subject to execution upon which your petitioner can levy for the satisfaction of said judgment so far as it can ascertain upon careful enquiry; that in consequence of such refusal and neglect of said county court to issue such county warrant to plaintiff and to levy said tax, and cause the same to be collected, your petitioner is without adequate remedy at law to obtain payment of said judgment or any part thereof;

7 that said demand on said county was made in writing, and said demand contained a notification to said county court and to said justices thereof that if they failed to issue and deliver to this plaintiff such warrant on the county treasurer on account of said judgment, interest, and costs, and failed to pay said judgment, interest, and costs, out of any funds in the county treasury, or failed to levy and collect said tax to pay said judgment and warrant as required by law, that this plaintiff would, on the first Monday of December, A. D. 1879, at 2 o'clock p. m., or as soon thereafter as a hearing could be had, apply to this court for a peremptory writ of mandamus to compel said County Court of Knox County to perform their said duty according to law, a copy of which said demand and notification is herewith filed and made a part of this petition.

The plaintiff further represents that no part of said judgment has been paid, but the whole of it is yet due and owing to it.

8 Your petitioner further shows that there is not sufficient money in the treasury of said county to pay said judgment and said warrant.

Wherefore your petitioner prays that a peremptory writ of mandamus issue from this court directed to the County Court of Knox County and to Caspar Fetters, John Callaway, and Antoine Hunolt, justices thereof, requiring them to issue a warrant in favor of the plaintiff on the county treasurer of said county, payable out of the general funds of the said county, for said judgment, interest, and costs, and to immediately levy and cause to be collected a tax on all the property in said county subject to taxation for such purpose, according to law, sufficient to pay off and discharge said warrant and said judgment, interest, and costs, and that they apply the same when collected to the payment thereof; and that your petitioner may have such other or further relief as to your honors shall seem meet and to justice and right may appertain.

And your petitioner will ever pray, &c.

9 THE WELLS & FRENCH COMPANY,
By SLEEPER & WHITON, *Its Att'ys.*

STATE OF ILLINOIS,
County of Cook, ss:

Charles F. Scoville, being first duly sworn, says that he is connected with and interested in the above-named corporation, as follows: As superintendent of said corporation in the manufacture of rolling stock for railways; that he resides at the city of Chicago, in said county of Cook, and is familiar with the facts mentioned in the foregoing petition; that he has

heard the same read and knows the contents thereof, and that the same is true of his own knowledge, except as to the facts therein stated to be upon information or belief, and as to those matters that he believes it to be true.

CHARLES F. SCOVILLE.

Subscribed and sworn to before me this 29th day of November, A. D. 1879.

[SEAL.] WILLIAM H. LEE,
Notary Public for the said County of Cook, residing at Chicago.

10 And thereupon, on said first day of December, 1879, the following proceedings were had upon the filing of the foregoing petition for mandamus, to wit:

Alternative writ allowed.

UNITED STATES EX REL. WELLS AND FRENCH Company, relator,
vs.
COUNTY COURT OF KNOX COUNTY AND THE Judges thereof, respondents.

Now comes the relator, by attorney, and files petition for a writ of mandamus against said respondents, commanding them to pay the judgment heretofore rendered herein against said county and in favor of said relator for the sum of twenty-four thousand six hundred and twenty-seven dollars and twenty-four cents, with interest thereon and costs; upon consideration whereof, and being fully advised in the premises, it is ordered that an alternative writ of mandamus issue herein, to be directed to the said respondents, the County Court of Knox County and Casper Fetters, John Calloway, and Antoine Hunolt, commanding them forthwith to
11 issue a warrant in favor of said relator on the county treasury of said county, payable out of the general or other funds in the treasury of said county by law applicable to such purpose, for the said judgment, interest, and costs, and that they immediately levy and cause to be collected a tax upon all the property in said county subject to taxation for such purposes according to law, and sufficient to pay off and discharge said warrant and said judgment, interest, and costs, and that they apply the same when collected to the payment thereof, or in default thereof that they make known to this court, on the third Monday of March next, at the opening of court on that day or as soon thereafter as counsel can be heard, why they have not done so.

And afterwards, to wit, on the fourth day of December, A. D. 1879, the following alternative writ of mandamus was issued in said cause, to wit:

12 *Alternative writ of mandamus.*

UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

The President of the United States of America to the County Court of Knox County and to the Justices thereof, greeting:

Whereas it has been represented to the circuit court of the United States

for the eastern district of Missouri on the part and behalf of the Wells and French Company, a corporation of the State of Illinois, and the relator herein, that on the 25th day of September, A. D. 1879, at the September term, A. D. 1879, of said court, the said relator obtained a judgment therein against Knox County, in the State of Missouri, for $24,627.24 (which bears 6 per cent. interest from the date of rendition thereof), and also for costs of said suit;

That said judgment was rendered for and on account of certain past-due bonds and coupons in the petition in said case described, being a part of certain bonds issued by said County of Knox, dated on the first of
13 February, A. D. 1868, whereby said county acknowledged itself indebted and promised to pay Missouri and Mississippi Railroad Company, or bearer, the said bonds and interest coupons in payment for stock subscribed to said company by said County of Knox, under the authority of the laws of the State of Missouri and an act of the general assembly of the State of Missouri, entitled "An act to incorporate the Missouri and Mississippi Railroad Company," approved Feb. 28, 1865;

That since the rendition of said judgment, to wit, on the 3rd day of November, A. D. 1879, the said relator caused demand to be made upon said County of Knox for payment of said judgment, and payment thereof was refused;

That on said 3rd day of November, A. D. 1879, the said relator made demand upon the county court of said county and upon Caspar Fetters, John Callaway, and Antoine Hunolt, justices thereof, for payment of said judgment, interests, and costs, and in default of such payment
14 that the said county court, and justices thereof proceed to levy a special tax upon all the property in said county made taxable by law for such purposes in said county as would be sufficient to pay off and discharge said judgment, with interest and costs, and the said county court and the justices thereof refused payment of said judgment, or any part thereof, and also refused and neglected, and still refuse and neglect, to levy said tax, or any tax whatever, for said purpose;

That said relator verily believed that said court and the parties thereof will continue to refuse payment of said judgment or to levy and tax therefor unless compelled to do so by order of this court;

That on said 3rd day of November, 1879, said relator demanded of said county court and the justices thereof that said court should issue and deliver, or cause to be issued and delivered, to its said relator, a county warrant on the county treasury of said Knox County for the amount
15 of said judgment, interest, and costs, to be paid out of the general funds of the county on presentation, and that if there be not sufficient money in said county treasury to pay said judgment, interest, and costs, that the said county court would cause to be levied and collected as required by law an amount of money sufficient to pay said judgment, interest and costs; all of which said county court refused and still refuses to do;

That said demand for payment and for said county warrant and for said levy and interest was made upon said county court and the justices thereof during the session of said county court, and that to its demand so made was attached a certified copy of said judgment, showing the amount thereof with interest and the amount of costs accrued and taxed by the clerk of this court.

That by the laws of the State of Missouri it is the duty of said county court to issue to the relator said county warrant and to pay said judgment, interest, and costs, by the levy and collection of said tax and in
16 no other way; that said county has no funds except such as may be raised by taxation for such purpose, nor has said county any property subject to execution upon which the said relator can levy for the satisfaction of said judgment so far as it can ascertain upon careful enquiry; that in consequence of such refusal and neglect of said county court to issue such county warrant to plaintiff and to levy said tax and cause the same to be collected the said relator is without adequate remedy by ordinary process at law to obtain payment of said judgment or part thereof; that said demand on said county court was made in writing, and said demand contained a notification to said county court and to said justices thereof, that if they failed to issue and deliver to the relator such warrant on the said county treasury on account of said judgment, interest, and costs, and failed to pay said judgment, interest, and costs out of any funds in the said county treasury, or failed to levy and collect said tax to pay said judgment and warrant as required by law, that this relator
17 would on the first Monday of December, A. D. 1879, at 2 o'clock p. m., or as soon thereafter as a hearing could be had, apply to this court for a peremptory writ of mandamus to compel said County Court of Knox County to perform their said duty according to law; a copy of which said demand and notification is filed with the petition herein and made a part thereof;

That no part of said judgment has been paid, but the whole of it is yet due and owing to said relator;

That there is not sufficient money in the treasury of said county to pay said judgment and said warrant;

Now, therefore, we, being willing that justice should be done in the premises, do command you that you, said County Court of Knox County and you the said Justices thereof, do issue a warrant in favor of relator on the county treasury of said county, payable out of the general or other funds in the treasury of said county by law applicable to such purpose,
18 for the said judgment, interest, and costs, and that you immediately levy and cause to be collected a tax upon all the property in said county subject to taxation for such purposes according to law and sufficient to pay off and discharge said warrant and said judgment, interest, and costs, and that you apply the same, when collected, to the payment thereof, or, in default thereof, that you make known to our said circuit court on the 3rd Monday of March next, at the opening of court on that day, or as soon thereafter as counsel can be heard, why you have not so done. Hereof fail not; and have you then and there this writ.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, this 4th day of December, 1879.

Issued at office, in Saint Louis, under the seal of said circuit court, the day and year last mentioned.

[SEAL.]

M. M. PRICE, *Clerk*,
By A. P. SELBY, *Deputy*.

On said writ is endorsed the following return of service, to wit:

19 UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

I return this writ, having executed the same by delivering to each of the county justices of Knox County, Missouri, namely, Caspar Fetters, Antoine Hunolt, and John Callaway, one alternative writ of mandamus in this case. Thus served on the 29th day of December, 1879, in the town of Edina, in Knox County, Mo., and within the eastern district of Missouri.

H. W. LEFFINGWELL,
U. S. Marshal,
By BENJAMIN BOWEN,
Deputy.

20 And afterwards, to wit, on the 15th day of March, A. D. 1880, at a regular stated term of said court, the following return of respondents was filed to the foregoing alternative writ of mandamus, in words and figures following, to wit:

Return to alternative writ of mandamus.

In the circuit court of the United States for the eastern district of Missouri. March term, 1880.

THE UNITED STATES EX REL. THE WELLS AND French Company, plaintiff,
vs.
THE COUNTY COURT OF KNOX COUNTY AND the Judges thereof, respondents.

Now, on this day come the respondents, and for return to the alternative writ of mandamus issued in the above-entitled cause, or so much thereof as they are advised that it is material for them to answer, and admit that on the 25th day of September, 1879, and during the September term, 1879, of said court, the relator recovered judgment against Knox County, in the State of Missouri, for the sum of $24,627.24, and also for the costs of said suit; that on the 3rd day of November, 1879, the relator
21 made demand upon these respondents, as Judges of Knox County Court, for payment of said judgment, interest, and costs, and in default of such payment that these respondents, as judges as aforesaid, proceed to levy a special tax upon all the property in said county made taxable by law for such purposes as would be sufficient to pay off and discharge said judgment, interest, and costs.

That these respondents, as judges as aforesaid, refused and still refuse to levy said special tax to pay said judgment, and that no part of said judgment, interest, and costs has been paid; and that these respondents, as judges as aforesaid, will continue to refuse to levy said special tax or any special tax to pay said judgment, interest, and costs for the reason hereinafter stated, except the special tax of $\frac{1}{20}$ of one %, which these respondents, as judges as aforesaid, are authorized to levy under and by authority

of the charter of the Missouri and Mississippi Railroad Company, as hereinafter more fully stated.

That on the 3rd day of November, 1879, the relator demanded of these respondents, as Judges of Knox County Court, that they should
22 issue and deliver or cause to be issued and delivered to the relator a county warrant for the amount of said judgment, interest, and costs, to be paid out of the general funds of said county on presentation, and if there be not sufficient money in the said county treasury to pay said judgment, interest, and costs, that these respondents, as judges as aforesaid, would cause to be levid, as required by law, an amount of money sufficient to pay said judgment, interest, and costs; and that these respondents refused to draw or cause to be drawn and delivered to the relator a warrant in the form requested; and that these respondents likewise refused to levy a tax as requested for the reasons hereinafter stated; and that these respondents still refuse to do so.

That said demands were all made upon these respondents as Judges of Knox County Court while in session as the County Court of Knox County

These respondents, for further return to said alternative writ of
23 mandamus, state that under and by virtue of an act of the general assembly of the State of Missouri, entitled "An act o incorporate the Missouri and Mississippi Railroad Company," approved February 20th, 1865, the corporators therein named, on the day of September, 1865, organized under and accepted the provisions of said act, and thereby became a body politic and corporate under the name of "the Missouri and Mississippi Railroad Company;" that in and by said act said Missouri and Mississippi Railroad Company was authorized to locate and build a railroad from the town of Macon, in the county of Macon, in the State of Missouri, through the town of Edina, in the county of Knox, and thence to or near the northeast corner of the State of Missouri, in the direction of Keokuk, in Iowa, or Alexandria, in Missouri, and from the town of Macon, in a southwesterly direction, to the Missouri River; that at the time of Knox County making the subscription and issuing the bonds with interest coupons to the Missouri and Mississippi Railroad Company,
24 as hereinafter stated, Knox County Court, under the constitution and general statutes of the State of Missouri, had no authority to make said subscription and issue said bonds and coupons without the assent of two-thirds of the qualified voters of Knox County given at a regular or special election held in said county for the purpose of obtaining such assent, except the authority which was conferred on it by the 13th section of the charter of said Missouri and Mississippi Railroad Company as hereinbefore referred to, which is as follows:

"It shall be lawful for the corporate authorities of any city, or town, or county court of any county desiring so to do, to subscribe to the capital stock of said company, and may issue bonds therefor, and levy a tax to pay the same, not to exceed one-twentieth of one per cent. upon the assessed value of the taxable property for each year."

That in and by the authority conferred upon Knox County Court by said section above, and no other authority or power, Knox County Court, on the 13th day of May, 1867, subscribed the sum of $100,000.00
25 on behalf of Knox County to the capital stock of said Missouri and Mississippi Railroad Company, and issued bonds for the sums of $5 .00 and $500.00 to it for that amount in payment of said subscription.

Said bonds were dated the 1st day of February, 1868, had interest-coupons attached for the interest at the rate of 7 % per annum, payable annually, and the bonds were payable ten years after date.

That said subscription was made without the assent of two-thirds of the qualified voters of Knox County, no election, regular or special, having been held in said county for the purposes of obtaining said assent, but on the contrary said subscription was made by Knox County Court against the wishes of a two-thirds majority of the qualified voters of said county.

That said judgment in favor of the relator was obtained on a portion of said bonds with the interest-coupons attached, issued by Knox County, in payment of said subscription to said Missouri and Mississippi Rail-
26 road Company, by Knox County as aforesaid, and it is so recited on the face of said bonds, and that they were issued under and pursuant to orders of the County Court of Knox County as authorized by said act of the general assembly of the State of Missouri; the only part of said act which confers any authority on Knox County Court to make said subscription and issue said bonds is the 13th section thereof, which is hereinbefore recited.

That neither the County Court of Knox County nor any other officer or agent of Knox County had any authority to make said subscription and issue bonds, except the authority which is conferred on Knox County Court by said 13th section of said act; and said subscription was made, said debt contracted, and said bonds were issued by Knox County to said Missouri and Mississippi Railroad Company as aforesaid, with express reference to payment only out of the money to be derived from the levy of a special tax of $\frac{1}{20}$ of one % each year upon the assessed value
27 of all the taxable property of Knox County.

That under and by virtue of the 13th section of said act the County Court of Knox County has each and every year since the issue of said bonds as aforesaid, levied a special tax of $\frac{1}{20}$ of one % upon the assessed value of all the taxable property in said county and caused the same to be extended on the tax-books of said county for each year, and had said special tax collected for the purpose of paying said bonds and interest coupons.

That the aggregate valuation of all the taxable property in Knox County is now and always has been less than $6,000,000. That in and by the 11th section of the tenth article of the constitution of the State of Missouri, the power of the County Court of Knox County is limited to the following rate of taxation for county purposes, viz:

"For county purposes the annual rate on property in counties having six million dollars or less shall not in the aggregate exceed fifty cents on the one hundred dollars valuation."

28 That at the time of making said subscription and issuing said bonds as hereinbefore stated, Knox County Court was, ever since has been, and still is limited in levying taxes for county purposes by the 165th section of the 118th chapter of Wagner's Missouri Statutes, as follows:

"The several county courts are empowered to levy such sums as may be annually necessary to defray the expenses of their respective counties by a tax upon all property and licenses made taxable by law for State purposes * * * but the county tax in no case shall exceed one-half of one per cent. on the taxable property."

That in and by authority of said section, Knox County Court has each and every year since the making of said subscription and issuing said bonds and coupons as aforesaid, levied a tax of $\frac{1}{2}$ of one % upon all property and licenses made taxable by law for State purposes for the purpose of annually defraying the expenses of carrying on and administering the government of Knox County.

29 That the money derived from the levy of said special tax of $\frac{1}{20}$ of one % is inadequate to pay said bonds and coupons as they mature and fall due, and the money derived from the levy of said annual tax of $\frac{1}{2}$ of one %, although prudently administered and economically applied is all annually absorbed in defraying the Government of Knox County.

That Knox County has no money in its treasury, with which it could pay the relator's judgment; that judgments to the amount of $28,746.57 had been rendered against Knox County in this honorable court prior to the rendition of the relator's judgment, which still remain in full force, unreversed, and unsatisfied, and Knox County has neither money nor property with which to pay said judgments.

That the respondents as Judges of Knox County Court have no legal authority to levy any other or greater taxes than the taxes hereinbefore stated, and they say and aver that they have no legal authority or power to levy or cause to be collected a special tax upon all the property in Knox County, subject to taxation sufficient to pay off and discharge said judgment, interest, and costs, or to pay off and satisfy any warrant issued therefor as they are commanded to do by said alternative writ of mandamus.

30

These respondents further state that they as Judges of Knox County Court are authorized and empowered under the laws of the State of Missouri to audit, adjust, and settle all unadjusted and unsettled accounts against Knox County, and to which said county is a party, and to order the payment of any sum of money which may be found by these respondents as Judges of Knox County Court to be due by Knox County, and to order the payment of such sum out of the county treasury, and to order their clerk to draw and issue a warrant therefor. But the statutes of the State which were in force at the time when said subscription was made, and said bonds and coupons were issued to said Missouri and Mississippi Railroad Company as hereinbefore stated, and which are still in force, expressly required, and they still so require that each and every warrant which they were and are authorized to order to be drawn by their clerk, must express upon its face the particular fund out of which the treasurer of the county must pay said warrant, and said treasurer is expressly prohibited by said statutes from paying such warrant out of any fund in the treasury other than the fund mentioned in such warrant. And it is expressly made a criminal offence by the statutes of said State for the county court of any county in said State or any member thereof to knowingly vote for the appropriation, disposition, or disbursement of any money belonging to any county other than the specific purpose for which the same was levied, assessed, appropriated, and collected.

31

32 That there are no such funds known to the statutes or laws of the State of Missouri as the funds described in said alternative writ of mandamus, to wit, "the general or other funds in the treasury of said county by law applicable to such purpose," i. e., the payment of the rela-

tor's judgment, interest, and costs, and there were no such funds at the time of making said subscription and issuing said bonds as hereinbefore stated, except the fund derived from the levy and collection of said special tax of $\frac{1}{2}\frac{1}{0}$ of one % as hereinbefore stated; that if these respondents, as Judges of Knox County Court, were to draw, or to order the clerk to draw, a warrant in favor of the relator upon the treasurer of Knox County for the amount of its judgment, interest, and costs, payable out of the general or other funds in the treasury of Knox County by law applicable to such purpose as commanded by said alternative writ of mandamus, there is, and legally there can be no such funds established, set apart,
33 or appropriated for the payment of such warrant, and out of which the treasurer of Knox County would be authorized by law to pay such warrant except the fund derived from the levy and collection of said special tax of $\frac{1}{2}\frac{1}{0}$ of one % as hereinbefore stated, and a warrant in the form required by said writ of mandamus would not comply with the requirements of the statutes of the State of Missouri in such case made and provided.

That if these respondents were to draw, or cause to be drawn, a warrant in favor of the relator in the form required by said writ there is no fund, and according to the statutes of the State of Missouri there will be no fund in the treasury of Knox County out of which said warrant could be paid by the treasurer thereof, except the money derived from the levy and collection of said tax of $\frac{1}{2}$ of one % which is required by the statutes of the State of Missouri to be annually levied, assessed, and collected for the express purpose of defraying the necessary expenses of carrying on
34 and administering the government in Knox County, and the money derived from this tax is declared by said statutes to be held sacred for this purpose, and it is and would be a violation of said statutes to appropriate and divert it to the payment of the relator's judgment, interest, and costs, or to the payment of a warrant drawn in favor of the relator therefor, for the reason that said judgment is not an expense or debt incurred by Knox County in the necessary administration of the government in Knox County.

That if a warrant should be drawn in favor of the relator, as required by said writ, and the same should be paid out of the money derived from said last-mentioned tax, and the other judgments hereinbefore mentioned, recovered on similar bonds and coupons against Knox County, should be required to be paid out of said money in the order of the presentation of the warrants therefor, there would be no money left in the treasury
35 of Knox County with which to defray the ordinary expenses thereof, and the effect would be that it would operate a suspension, and, perhaps, a disorganization of the government in Knox County.

That these respondents, as Judges of Knox County Court, have ever since the rendition of said judgment in favor of the relator, been ready and willing to draw a warrant in favor of the relator for the full amount of its said judgment, interest, and costs upon the treasury of Knox County, to be paid out of the special fund derived from the levy and collection of said special tax of $\frac{1}{2}\frac{1}{0}$ of one %, as hereinbefore stated, and they hereby offer to draw a warrant as aforesaid, whenever the relator should signify its desire to have a warrant so drawn.

These respondents, as Judges of Knox County Court, say they have no

legal authority or power to draw a warrant on the treasurer of Knox County in favor of the relator for the amount of its judgment, interest, and costs upon the funds described in said writ as therein commanded,
36 and they say they have no legal authority or power to draw a warrant upon the treasurer of Knox County in favor of the relator for the amount of its said judgment, interest, and costs upon any other or different fund than said special fund derived from the levy and collection of said special tax of $\frac{1}{20}$ of one %.

These respondents say that the Missouri and Mississippi Railroad Company has never built any railroad through or into Knox County, and there is no prospect that it ever will, as it is hopelessly insolvent. And these respondents further say that Knox County has fully complied with and performed said contract between it and said Missouri and Mississippi Railroad Company and the holders of its bonds as aforesaid, including the relator, and they set up and plead the foregoing facts as good, valid, legal reasons why they, as Judges of Knox County Court, do not issue or cause to be issued a warrant in favor of the relator, as commanded by said alternative writ of mandamus; and also why they do not levy and
37 cause to be collected a special tax upon all the property in said county subject to taxation sufficient to pay off and discharge said judgment, interest, and costs, or a warrant drawn in favor of the relator therefor.

Wherefore they ask to be discharged with their costs.

CASPER FETTERS, SEN.
JOHN CALLAWAY.
ANTONY HUNOLT.

CARR & REYNOLDS, *Of Counsel.*

This day personally appeared before the undersigned, clerk of the county court of Knox County, in the State of Missouri, Casper Fetters, sen., John Callaway, and Antony Hunolt, who, being by me first duly sworn, according to law, depose and say that they have read and heard read the foregoing return, and that the matters and facts as therein stated are true, according to the best of their knowledge and belief.

CASPER FETTERS, SEN.
JOHN CALLAWAY.
ANTONY HUNOLT.

Subscribed and *subscribed* to before me this 2d day of March, A. D. 1880.

38 In testimony whereof I have hereto subscribed my name and affixed the seal of said court.

[SEAL.]

FRANK P. HALL,
Clerk County Court.

And thereupon on said 15th day of March, 1880, the following demurrer was filed to the foregoing alternative writ of mandamus, to wit:

Demurrer to return to alternative writ.

UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

U. S. EX REL. WELLS & FRENCH COMPANY
vs.
COUNTY COURT OF KNOX COUNTY AND THE Justices thereof.

And now comes the relator and demurs to the return of the respondents to the alternative writ of mandamus in the above cause and asks that they be required to make further return for these reasons, viz:

1. Said return shows no cause why the respondents should not issue to the relator a warrant upon the treasurer of said county payable out of the general funds thereof as specified in said alternative writ.

39 2. Inasmuch as said alternative writ does not contemplate compelling the respondents to levy any tax not permitted by the laws of the State of Missouri to be levied, it is no answer to the relator's petition to aver that the respondents have power only to levy annually $\frac{1}{2}$ of 1 % on the taxable property of said county for county purposes, and $\frac{1}{20}$ of 1 % on such property annually to create a fund to pay off the railroad debt of said county.

3. The relator is entitled to a warrant in the form sought by said alternative writ, and is likewise entitled to have the respondents levy every tax permitted by the State of Missouri annually so long as any part of the relator's judgment remains unsatisfied, and the return is no sufficient answer to this claim on the part of the relator.

4. The laws of the State of Missouri, by which the moneys collected for county purposes annually by said county are subdivided into funds to be specially drawn upon, constitute no defense to the relator's claim for a peremptory mandamus as sought by him.

SLEEPER & WHITON,
Att'y' for Relator.

40 And on said 15th day of March, 1880, the following proceedings were had and appear of record in said cause, to wit:

Demurrer submitted.

UNITED STATES EX REL. WELLS & FRENCH Company, relator,
vs.
COUNTY COURT OF KNOX COUNTY AND THE Judges thereof, respondents.

Now comes the relator, by its attorneys, and files demurrer to return of respondents to the alternative writ of mandamus herein. And thereupon the parties, by their attorneys, file a stipulation that said demurrer may be

submitted upon written briefs as follows: The relator to file its brief within ten days, and the respondents to reply thereto within ten days thereafter; upon which the demurrer shall be decided by the court, and further agreeing that the court may modify the peremptory writ of mandamus sought, in such way as shall make it conform to the law if issued.

And afterwards, to wit, on the 9th day of April, 1880, at said term of court, the following further proceedings were had and appear of record in said cause, to wit:

41 *Demurrer sustained.—Peremptory writ allowed.*

UNITED STATES EX REL. WELLS & FRENCH Company, relator,
vs.
COUNTY COURT OF KNOX COUNTY AND THE Judges thereof, respondents.

Now come the parties, by their respective attorneys, and the court having examined the questions of law arising upon the demurrer of relator to the return of respondents to the alternative writ of mandamus herein, and being fully advised in the premises, finds the law thereon for the relator; whereupon it is ordered that said demurrer to return be, and the same is hereby, sustained.

And thereupon, on motion of said relator, it is by the court ordered that a peremptory writ of mandamus issue herein, to be directed to the said respondents, commanding them forthwith to cause a warrant or warrants to be issued in favor of the Wells and French Company for the aggregate amount of its judgment heretofore rendered against said county and in favor of said relator, with interest thereon and costs, including the costs of the mandamus proceedings, and drawn upon the treasurer of said
42 Knox County and payable out of the general funds of the said county for county purposes; and that from time to time, annually, they cause to be levied and collected from the taxable property in the said Knox County all such taxes which they are by law permitted to levy and collect annually from such property, to the end that a sufficient fund may be created to pay and satisfy the relator's said judgment, interest, and costs, so far as the same can be done as aforesaid, and that they certify perfect obedience to said writ to this court on the first day of the next term thereof, to be begun and holden on the third Monday, the 20th day of September next.

MEMO.—His honor Judge McCrary took no part in the disposition of this case.

And afterwards, to wit, on the 13th day of May, A. D. 1880, at said term of court, the following further proceedings were had and appear of record in said cause, to wit:

43 *Writ of error allowed and supersedeas awarded.*

UNITED STATES EX REL. WELLS & FRENCH Company, relator,
vs.
COUNTY COURT OF KNOX COUNTY AND THE Judges thereof, respondents.

Now come the said respondents, by their attorneys, and present to the court a writ of error to remove this cause to the Supreme Court of the United States, and a citation citing and admonishing the said relator to be and appear at a Supreme Court of the United States, at the next term thereof, on the second Monday of October next, which said writ of error is allowed, and said citation signed by the judge; and the said respondents also present to the court their bond in the penal sum of one thousand dollars, which bond is approved; and, on motion of said respondents, it is ordered that a supersedeas be awarded, staying further proceedings on the mandamus herein.

Said supersedeas bond is in words and figures following, to wit:

44 Know all men by these presents that we, Casper Fetters, Antony Hunolt, John Callaway, Louis F. Cottey, Wm. Parks, and Ed. M. Randolph, are held and firmly bound unto the Wells and French Company, the full and just sum of one thousand dollars, to be paid to the said Wells and French Company, its heirs, executors, administrators, or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 3rd day of May, in the year of our Lord one thousand eight hundred and eighty.

Whereas, lately, at the March term, 1880, of the circuit court of the United States for the eastern district of Missouri, in a suit depending in said court, between the United States ex rel. the Wells and French Company, plaintiff, and the County Court of Knox County and the Justices thereof, defendants, judgment was rendered against the said County Court of Knox County and the Justices thereof, that they issue a warrant in favor of the relator, on the county treasurer of Knox County, payable out of the general funds in the treasury of said county, for the amount of the relator's judgment rendered against said county in said court on the 25th day of September, 1879, for $24,627.24, and the interest thereon and costs; and said defendants having obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Wells and French Company, relator as aforesaid, citing and admonishing it to be and appear at a Supreme Court of the United States, to be holden at Washington, the second Monday of October next:

Now the condition of the above obligation is such, that if the said County Court of Knox County and the Justices thereof shall prosecute said writ of error to effect, and answer all damages and costs if it fail to

make good its plea, then the above obligation to be void; else to remain in full force and virtue.

CASPER FETTERS, SEN. [SEAL.]
ANTONY HUNOLT. [SEAL.]
JOHN CALLAWAY. [SEAL.]
LEWIS F. COTTEY. [SEAL.]
WM. PARKS. [SEAL.]
ED. M. RANDOLPH. [SEAL.]

Sealed and delivered in presence of—
Approved by—

SAMUEL TREAT, *Judge.*

44½ OFFICE OF COUNTY CLERK OF KNOX CO.

STATE OF MISSOURI,
County of Knox, ss:

I, Frank P. Hall, clerk of the county court within and for the county of Knox, and State of Missouri, hereby certify that the securities to the within and foregoing bond are all citizens of Knox County, Mo., and that they have property subject to execution, very largely in excess of the amount named in said bond.

Given under my hand and seal at Edina, Mo., this 3rd day of May, A. D. 1880.

[SEAL.] FRANK P. HALL,
Clerk County Court.

(Indorsed:) No. 1525. United States circuit court, eastern district of Missouri. United States ex rel. Wells and French Co. vs. Knox County Court. Copy of bond. $. , principal.
, sureties. Filed 13 day of May, 1880. M. M. Price, clerk.

45 UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

I, M. M. Price, clerk of the circuit court of the United States in and for the eastern district of Missouri, do hereby certify that the writing hereto attached *to be* a true transcript of the pleadings and proceedings in case No. 1525, of the United States ex. rel. The Wells and French Company, relator, against The County Court of Knox County and the Judges thereof, respondents, as fully as the same remain on file and of record in said case in my office.

In witness whereof I hereunto subscribe my name and affix the seal of said court, at office in the city of St. Louis, in said district, this 12th day of August, in the year of our Lord eighteen hundred and eighty.

[SEAL.] M. M. PRICE,
Clerk of said Court.
By A. P. SELBY, *Deputy.*

(Indorsed:) No. . United States circuit court, eastern district of Missouri. against . Duly certified copy of the in the above-entitled cause.

(Indorsment on cover:) No. 81. The County Court of Knox County, Missouri, and the Judges thereof, plaintiff in error, vs. The United States ex. rel. The Wells & French Company. E. Missouri C. C. U. S. Filed 9th October, 1880.

109-229

FILED
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1883.

COUNTY COURT OF KNOX COUNTY and the Justices thereof,
Plaintiffs in Error.
vs.
UNITED STATES *ex rel.* THE WELLS & FRENCH COMPANY,
Relator.

No. 81.

In Error to the Circuit Court of the United States for the Eastern District of Missouri.

STATEMENT AND BRIEF FOR PLAINTIFF IN ERROR.

JAMES CARR,
GEO. D. REYNOLDS,
Counsel for Plaintiffs in Error.

Pierce Bros., Printers 118 North Third Street.

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OCTOBER TERM, 1883.

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Plaintiffs in Error.
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Relator.
} *No.* 81.

In Error to the Circuit Court of the United States for the Eastern District of Missouri.

STATEMENT OF THE CASE.

On the 25th day of September, 1879, the relator recovered judgment against Knox County, in the State of Missouri, for $24,627.24, on certain past due bonds, dated February 1, 1868, and coupons, issued by said county to the Missouri and Mississippi Railroad Company, under and by authority of an act of the General Assembly of the State of Missouri, entitled "An act to incorporate the Missouri and Mississippi Railroad Company," approved February 20, 1865. This judgment not being paid, on the 1st day of December, 1879, the relator filed a petition for an alternative writ of mandamus, commanding the plaintiffs in error "to issue a warrant in favor of the relator on the county treasurer of said county, payable out of the general fund of the said county for said judgment, interest and costs, and to immediately levy and cause to be collected a tax on all the

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property in said county subject to taxation for such purpose, according to law, sufficient to pay off and discharge said warrant and said judgment, interest and costs, and that they apply the same, when collected, to the payment thereof." [Transcript, p. 4.]

The alternative writ of mandamus was issued the same day as prayed for. [Transcript, p. 5.] On the 15th day of March, 1880, the plaintiffs in error made their return to said alternative writ of mandamus, in which they admitted the recovery of the judgment as alleged and they averred that the bonds upon which said judgment was recovered recited on their face that they were issued under and pursuant to orders of the County Court of Knox County, as authorized by said act of the General Assembly of the State of Missouri, and that the only part of said act which conferred any authority on Knox County Court to subscribe and issue bonds to the Missouri and Mississippi Railroad Company is the 13th section thereof, which is as follows:

"It shall be lawful for the corporate authorities of any city or town, or County Court of any county desiring so to do, to subscribe to the capital stock of said company, and may issue bonds therefor and levy a tax to pay the same not to exceed one-twentieth of one per cent. upon the assessed value of the taxable property for each year." (Transcript, p. 9.)

That on the 13th day of May, 1867, Knox County Court subscribed the sum of $100,000 on behalf of Knox County to the capital stock of the Missouri and Mississippi Railroad Company. That said subscription was made without the assent of two-thirds of the qualified voters of Knox County, no election, regular or special, having been held in said county for the purpose of obtaining said assent. That the plaintiffs in error had levied a special tax of one-twentieth of one per cent. each and every year upon the assessed value of all the taxable property of Knox County, and that they had no authority to levy any other or greater tax to pay off and discharge the relator's judgment, interest, and

costs, and that they had no authority to draw a warrant upon the general or other funds in the treasury of Knox County, as commanded by said alternative writ of mandamus, and that no other fund was, or is, subject to the payment of said judgment except said special fund derived from the levy and collection of said special tax of one-twentieth of one per cent. (Transcript, p. 8.)

The relator demurred to this return and the court sustained the demurrer, and ordered a peremptory writ of mandamus to be issued, commanding the plaintiffs in error to cause a warrant to be "drawn upon the treasurer of Knox County payable out of the general funds of the said county for county purposes; and that from time to time annually they cause to be levied and collected from the taxable property in the said Knox County all such taxes which they are by law permitted to levy and collect annually from such property, to the end that a sufficient fund may be created to pay and satisfy the relator's said judgment, interest, and costs." (Transcript, p. 15.) Thereupon the plaintiffs in error sued out a writ of error to this court.

ASSIGNMENT OF ERRORS.

On the record in this case the County Court of Knox County assigns the following errors:

1. The court below erred in sustaining the relator's demurrer to the return made by the plaintiffs in error.

2. The court erred in issuing a peremptory writ of mandamus, commanding the County Court of Knox County to cause a warrant to be drawn upon the treasurer of Knox County, "payable out of the general funds of the said county for county purposes; and that from time to time, annually, they cause to be levied and collected from the taxable property in the said Knox County all such taxes which they are by law permitted to levy, and collect annually from such property to the end that a sufficient fund may be created to pay and satisfy the relator's said judgment, interest and costs."

3. The money derived from the levy, assessment and collection of the tax of one-half of one per cent. is a *trust fund* to pay the current expenses of carrying on and administering the government in Knox County and, as such, the relator is not entitled to have a warrant drawn on it for the payment of his judgment, interest and costs, as it is not a debt incurred in the administration of the government in said county.

4. The County Court of Knox County had no authority to draw, or cause to be drawn, a warrant "upon the treasurer of said county, payable out of the general funds of said county for county purposes."

5. The County Court of Knox County has no authority to levy a special tax upon the taxable property in said county to pay and satisfy the relator's judgment, interest and costs, as commanded by said peremptory writ of mandamus.

BRIEF.

The principal questions presented by the record in this case are:

First. Is the relator entitled to have a warrant at all drawn "payable out of the general funds of the said county for county purposes," for the amount of his judgment, interest and costs? *Second.* If it shall be held that he is so entitled, then, whether the order commanding it to be drawn should not be so modified and the warrant so drawn that the treasurer would not be required to pay it or any part of it *out of the ordinary revenues of the county*, until the current expenses of carrying on and administering the government in the county should first have been fully paid out of said revenues, and, if there should be any remainder, that it only should be applied to the payment of said warrant? *Third.* Is the relator entitled to have a special tax levied to pay his judgment, interest, and costs?

I.

The County of Knox is presented by the record in this case in a two-fold relation. The one is in its *public* character as a municipal corporation, created, organized and maintained as an agency of the government of the State of Missouri *pro bono publico*. The other is, in its character as a mere *private* corporation, authorized by the charter of the Missouri and Mississippi Railroad Company to take and hold stock, like an individual, in the capital stock of said company. The duties and obligations imposed upon it in the former character are a *trust*, and under all circumstances are paramount to its duties and obligations in its latter character. All property and revenues, held by it in its public character, are held as a trust, and it is simply a trustee; and no creditor whose debt has been contracted by it in its character of a *private* corporation can legally levy on, sequestrate or appropriate such property or revenues to the payment of his debt. Otherwise, it might go into private speculations on its own account, and they might prove disastrous; and if its private creditors could resort to the property and revenues held by it in trust for public purposes, the county not only might, but would become so crippled and paralyzed, sooner or later, that it would be utterly incapable of discharging the duties and obligations to the public for which it was created and organized. *Salus populi suprema lex esto.*

Merriwether v. Garrett, 102 U.S., 472.
United States v. Union Pacific R.R. Co., 98 *id.*, 570.
Sinking Fund Cases, 99 *id.*, on p. 724.
Tucker v. Ferguson, 22 Wall., on p. 572.
Broughton v. Pensacola, 93 U.S., 266.
Bank of U.S. v. Planter's Bank of Georgia, 9 Wheat. 904.
Bailey v. Mayor of New York, 3 Hill, 531.
Mayor of New York v. Bailey, 2 Denio, 433.
Grotius, Liber, 2, chap. 14, sec. 2, p. 114.
Moodalay v. The East India Co., Brown Ch. 469.

II.

1. Counties are political divisions of the State, and county courts are agents of the State established for *public* and *governmental* purposes.

State v. Macon County Court, 68 Mo, 29.
Reardon v. St. Louis County, 36 *id.*, 555.
St. Louis, etc., v. St. Louis County Court, 34 *Id.*, 546.
Barton County v. Walser, 47 Mo., 189.
Steines v. Franklin County, 48 *id.*, 188.
Ray County v. Bentley & Barr, 49., *id* 236.
New Orleans v. Clark, 95 U. S. 654.
Mount Pleasant v. Beckwith, 100 U. S. 514.

2. Subscribing to the capital stock of a railroad company is not one of the purposes for which government is established.

Loan Association v. Topeka, 20 Wall, 555.
Hanson v. Vernon, 27 Iowa, 28.
Whiting v. Sheboygan, etc., R. R. Co., 25 Wis. 167.

3. The subscription in question was made by a faithless County Court against the wishes of two-thirds of the qualified voters of Knox County, the assent of said voters not having been obtained, as required by the Constitution and general statutes of the State. Hence the relator has no rights except those conferred by the thirteenth section of the charter of the Missouri and Mississippi Railroad Company.

Carpenter v. Lathrop, 51 Mo., 467.
State v. Garroutte, 67 *id.*, 445.
Leavenworth, etc., R. R. Co. v. Platte Co. Court, 42 *id.*, 171.
Supervisors v. United States, 18 Wall. 71.

4. The subscription was made and the bonds and coupons were issued solely and exclusively under and by authority of the thirteenth section of the charter of the Missouri and Mississippi Railroad Co. The whole contract between the Coun-

ty of Knox and the railroad company and the holders of the bonds and coupons issued to it is contained in that section. It authorizes the issuing of the bonds, and it provides a specific fund for their payment, *i. e.*, the fund to be derived from the levy and collection of the special tax of one twentieth of one per cent. The provision of this fund excludes the right to proceed against any other fund. *Expressio unius est exclusio alterius.*

Lindell v. H. & St. Jo. R. R. Co., 36 Mo., 343.
Leary v. Same, 38 *id.*, 485.

5. This subscription was made and the bonds and coupons were issued by Knox County in its character as a *private* corporation, and not in its *public* character as a division and agency of the State government. Hence, the relator has neither legal nor moral right to ignore the contract under which his bonds and coupons were issued, and resort to the *ordinary revenue fund* of Knox county, which has been expressly created and established under the laws of the State for the purpose of carrying on and administering the government in Knox County. If he were permitted to do so, it would be a monstrous diversion and perversion of a trust fund belonging to the State, although managed and controlled by the County Court of Knox County under and by authority of the statutes of the State.

Broughton v. Pensacola, 93 U. S., 266.
Merriwether v. Garrett, 102 *id.*, 472.

III.

1. The law enters into and becomes a part of the contract as fully to all intents and purposes as if it were copied into it *in hæc verba*.

State v. Macon County Court, 68 Mo., 29.
State v. Shortridge, 56 *id.*, 126.
Van Hoffman v. City of Quincy, 4 Wall., 554.
Hawthorn v. Calef, 2 *id.*, 10.

2. This court follows the decisions of the highest court of a State construing its own Constitution and Statutes.

Supervisors v. United States, 18 Wall., 71.
Bailey v. Maguire, 22 *id.*, 216.
Leffingwell v. Warren, 2 Black, 599.
Green v. Neal, 6 Pet., 291.
United States v. Morrison, 4 *id.*, 124.
Elmendorf v. Taylor, 10 Wheat. 152.
Fairfield v. County of Gallatin, 100 U. S., 47.

3. The Supreme Court of Missouri has construed the 13th section of the charter of the Missouri and Mississippi Railroad Company, and it has decided that a judgment creditor, whose judgment has been obtained on bonds and coupons issued by Knox County to the Missouri and Mississippi Railroad Company, under and by authority of said section, is not entitled to have a warrant drawn on the ordinary revenue fund of the county for the amount of such judgment.

State v. Macon County Court, 68 Mo., 29.
State v. Shortridge, 56 *id.*, 126.

4. The relator's debt was contracted with express reference to payment only out of the money derived from the levy and collection of the special tax of one-twentieth of one per cent. Where this is the case the creditor has no right to resort to any other fund, although the fund with reference to which the debt was contracted, turns out to be inadequate to pay the debt. Such is the uniform construction of the statutes of the State given by the Supreme Court of Missouri to debts contracted by counties, when acting strictly and purely in their public character for *governmental* purposes. *A fortiori*, then, should a creditor of a county whose debt had been contracted by it in its character as a *private* corporation with express reference to payment out of a *specific* fund, created, set apart and appropriated expressly for the payment of such debt, not be allowed to have a warrant drawn upon the *ordinary revenue* fund of such county.

Pettis County v. Kingsbury, 17 Mo., 479.
Kingsbury's Executors v. Pettis County, 48 *id.*, 208.
State v. Bollinger County Court, 48 *id.*, 473.
Campbell v. Polk County, 49 *id.*, 214.
State v. Macon County Court, 68 *id.*, 29.
Cook v. Putnam County, 70 *id.*, 668.
Moody v Cass County, 74 *id.*, 307.
Campbell v. Polk County Court, 76 *id.*, 57.

The attention of this court was not called to the foregoing decisions of the Supreme Court of Missouri, when the case of the United States v. Clark County (96 U. S., 211), was before it for decision. Now, as the construction contended for is not new, but was settled in the case of Pettis County v. Kingsbury, *supra*, by the Supreme Court of Missouri, a quarter of a century before the decision by this court in the Clark County case, and that construction has ever since been uniformly followed by the Supreme Court of Missouri, this court will follow this construction even in a case where it has previously given a different construction.

Supervisors v. United States, 18 Wall., 81.
Loan Ass'n. v. Topeka, 20 Wall., 555.
U. S. v. Co. of Macon, 99 U. S., 582.
Harshman v. Bates Co. 92 U. S., 569.
Cass County v. Johnson, 95 U. S., 360.

When authority is granted to a subdivision of the State to contract an extraordinary debt by issue of bonds, the power to levy sufficient taxes to meet it is implied, *unless the act which confers the authority*, or some general law of the State in force at the time, clearly manifests a contrary legislative intention.

U. S. v. New Orleans, 98 U. S., 381.
Ralls County Court v. U. S. *ex rel.*, 105 U. S., at p. 735.

IV.

1. The rights of the government are always paramount to those of the citizen. He holds his life, his liberty, his

property—everything that he has—subordinate to these paramount rights. Government must live, regardless of the hardship upon the citizen in maintaining the life of the government. It is upon this principle that the citizen is *drafted* into the military service of government; that senators and representatives are privileged from arrest in all cases, except treason, felony and breach of the peace; that the salary of a public officer is not subject to garnishment; that the salary of a United States officer cannot be taxed by a State of which he is a citizen; and, *e converso*, the salary of an officer of a State cannot be taxed by the United States.

§ 6, Art. I, Constitution of the United States.
§ 16, Art. IV, Constitution of Missouri.
The Collector v. Day, 11 Wall. 113.
Dobbins v. Com'rs. of Erie County, 16 Pet., 435.
Hawthorn v. St. Louis, 11 Mo., 59.
Fortune v. Same, 23 *id.*, 239.
Erie v. Knapp, 29 Pa. St.,173.
Schaffer v. Cadwallader, 36 *id.*, 126.
1 Dillon Municipal Corp., §§ 64, 65, and 2 *id.*, 446.
§ 10, p. 604, Wagner's Mo. Stats.
§ 3, p. 664, *ibid.*
Loan Ass'n v. Topeka, 20 Wall. 555.
U. S. v. Co. of Macon, 99 U. S., 582.

2. The government was a privileged creditor under the Roman law, and it has been under the government of every nation since the downfall of the Roman empire. The United States government and the government of the State of Missouri are entitled to *priority* in the payment of debts.

1 Kent, p. 269 (10th Ed.)
Rev. Stats. U. S., § 5101, p. 988.
Wagner's Mo. Stats., § 1, p. 191.

3. The current expenses incurred by a county in its public capacity in carrying on and administering the government must first be paid, before a judgment creditor whose

judgment was obtained for a debt incurred by the county in its character of a *private* corporation.

Coy v. City of Lyons, 17 Iowa, 1.
Coffin v. City of Davenport, 26 *id.* 515.
Grant v. City of Davenport, 36 *id.* 396.
Com. v. Com'rs. of Lancaster Co., 6 Binney, 5.
Same v. Com'rs. of Philadelphia Co., 1 Wharton, 1.
Same v. Same, 2 *id.* 286.

V.

There is no such fund, either *de jure* or *de facto*, known to the statutes of Missouri as "the general funds" of Knox County. The return shows this to be the case, and it is admitted by the demurrer. The peremptory writ commanded the plaintiff in error to draw a warrant upon a fund which had no existence. The law does not require a court to do a fruitless act.

High on Extraordinary Legal Remedies, § 352.
§§ 28, 32, p 414. Wagners' Statutes.
R. S. Mo., 1879, § § 6818, 6819, 6820.

More can not be required of a public officer by *mandamus* than the law has made it his duty to do.

Ex parte Rowland, 104 U. S., at p. 612.
U. S. v. County of Macon, 99 U. S. 582.
Supervisors v. United States, 18 Wall, 81.

The treasurer is probibited from disbursing any money in his hands, except on warrants *legally* drawn on him by order of the County Court; and said warrants must be paid "in the order presented," "when there shall be money in the treasury *belonging to the fund drawn upon* sufficient to pay such prior warrants and any such warrants so presented."

§§ 7, 8 and 9, pp. 410, 411, Wag. Stat.

A penalty and forfeiture of office are inflicted on the treasurer for disobedience.

§ 18, p. 412, *ibid.*

The treasurer would either have to disregard a warrant

drawn on "the general funds" of the county, on the ground that there are no such funds, and subject himself, if he should be mistaken, to penalty and forfeiture of office if the holder of the warrant should push him to the extent of the law; or if he treated it as drawn on the *ordinary revenue fund* of the county, then he would have to pay it "in the order presented," and the result would be that it would take all the money in the treasury which had been levied, assessed and collected for the express purpose of defraying the expenses incurred in carrying on and administering the government in the county; and the government would, for the want of money, become suspended, paralyzed, and, sooner or later, inevitably disorganized. The plaintiffs in error, as Judges of Knox County Court, have no power or authority to levy any other taxes than the special tax of one twentieth of one per cent. under the charter of the Missouri and Mississippi Railroad Company, and the ordinary revenue tax of one half of one per cent. for defraying the expenses of carrying on and administering the government in Knox County. The latter is a *trust* fund, and is all consumed in the administration of the trust. The relator has no claim on *it* by virtue of his contract with Knox County. He has no legal right to divert and pervert this trust fund to the payment of his debt. It does not come within the terms of the trust. Moreover, the statutes of Missouri make it a criminal offense to divert the ordinary revenues of the county from their legitimate purpose, and pervert them to another and different purpose.

Session Acts 1874, § 1, p. 45.
State v. Garroutte, 67 Mo., 456.

The Supreme Court of Missouri has twice decided that the County Court has no authority to levy any other or greater taxes than those mentioned, and those decisions have twice been followed by this court.

State v. Shortridge, 56 Mo., 126.
State v. Macon County Court, 68 *id.*, 29.
United States v. County of Clark, 95 U. S., 769.
United States v. County of Macon, 99 *id.*, 582.

To require a warrant to be drawn in favor of the relator for the amount of his judgment upon the ordinary revenue fund of Knox County—*a fund held in trust* for the State of Missouri,—or even, in the language of the peremptory writ of mandamus in this case, "upon the general funds of said county," would be, not to enforce the law, but to break it! It would be to break down all the bulwarks established by the State in its Constitution and laws for the protection of the State government. "The State is dependent upon the machinery of its county governments for the assessment and collection of taxes for its support, and the payment of its debt. We cannot so exercise our discretion as to direct the issuance of a writ in this case and thus establish a principle tending to overthrow the county governments, and thus to impair the power of the state to maintain itself."

State v. Macon County Court, *supra*.

The return shows that Knox County has neither money nor property held in its own proprietary right with which it could pay the relator's judgment (page 11 of transcript). And if a warrant should be drawn as required by said writ, and paid out of the ordinary revenue fund of the county in the order of the presentation of such warrant, there would be no money left in the treasury of Knox County with which to defray the ordinary expenses of carrying on and administering the government in Knox County, and "the result would be that it would operate a suspension, and, perhaps, a disorganization of the government in Knox County." (Page 12 of transcript.)

These facts are all admitted by the demurrer filed by the relator. Is this court going to affirm a judgment which would produce such anarchical consequences? It would be at variance with every decision and every utterance ever made by this court from the organization of the government down to date, unless the decision of the majority of this court in the Clark County case is to be understood and applied as it was by the court below in this case. If that decision is to be so understood and applied, then I have no

hesitation in saying, with all due respect, that it is erroneous and should be overruled.

The court below entirely ignored the *facts* stated in this return which were not stated in the return of the Clark County case at all. The case now presented is so entirely different from the case then presented that the Clark County case should not be applied as a precedent to rule in this case.

The statute of Missouri requires the assessor of the county to make out and return to the county court, on or before the 20th of January in each year, a fair copy of the assessor's book. This book shows the *aggregate valuation* of all the taxable property in the county; and the same statute requires the clerk of the county court to immediately make out an abstract of the assessment book, showing the same thing, and forward the same to the State Auditor at the State capital.

§ 61, p. 1170, Wag. Stat.

Thus the aggregate valuation of all the taxable property of Knox County could have been ascertained by the purchasers of the bonds in question, by simply examining the records in the county clerk's office of Knox county, or doing the same thing in the State Auditor's office at the State capital. Then, by making a small mathematical calculation, they could have ascertained to a cent the amount of money which could be realized from the levy and collection of the special tax of one twentieth of one per cent on this aggregate valuation. This is the only fund which Knox County had or could have applicable to the payment of these bonds or coupons. In contracting this debt Knox County did it in its character as a *private* corporation; and if it had, in the language of Mr. Justice Field in Merriwether v. Garrett, *supra*, either money or property "*in its own right for profit or as a source of revenue, not charged with any public trust or use, and funds in its possession not appropriated to any specific purpose*," then it is admitted that such money or property would be applicable to the payment of the debt in question. But the return shows that it has

neither. The debt is a legal debt. The obligation remains unimpaired. *But the debtor is insolvent.* Knox County is unable to pay it. It stands in the category of any other private corporation which has contracted a legal debt which it is unable to pay. After having appropriated all its assets to the payment of its debts, it can do no more. The creditor is at the end of his rope. He has no right to have funds held *in trust* by the debtor appropriated to the payment of his debt. This is precisely what is sought to be done by the relator in this case.

VI.

The relator is not entitled to the levy of a special tax to pay his judgment, interest and costs.

U. S. v. Macon County, 99 U. S., 582.
State v. Shortridge, 56 Mo., 126.
State v. Macon County Court, 68 Mo., 29.

Viewed in any aspect in which the return in this case presents, the judgment of the court below is erroneous, and it should be reversed and the plaintiffs in error discharged.

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